Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Bartolomei de la Cruz** **Judgment No. 1972**

The Administrative Tribunal,

Considering the complaint filed by Mr Héctor Guido Bartolomei de la Cruz against the International Labour Organization (ILO) on 28 July 1999, the ILO's reply of 29 October, corrected on 8 November 1999, the complainant's rejoinder of 13 March 2000 and the Organization's surrejoinder of 19 April 2000;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1941 and has both Argentine and Italian nationalities, joined the International Labour Office, the ILO's secretariat, in 1973 as a lawyer in the International Labour Standards Department. He was appointed director of the department in 1992.

On 5 November 1998 a member of his staff handed in to the complainant copies of two e-mail messages addressed to an official of the Standards Department which he purportedly found in a photocopying machine. The first, dated 15 October 1998, mentioned that it was a foregone conclusion that the official in question would be promoted following a forthcoming competition. In the second, dated 3 November 1998, a member of the ILO's Multidisciplinary Team in Lima, Peru, asked the official to join him in Ecuador in order to take part in a sub-regional seminar in preference to another member of the team. The complainant decided to report the matter to the official's immediate supervisor. The supervisor spoke with the official, who told him that the e-mails were private and that he intended to report the incident to the Staff Union Committee, of which he was a member. On 12 November, the complainant sent a minute to the Director of the Personnel Department attaching copies of the two e-mails and asking her to take appropriate action. In a minute of 18 November she replied that the e-mails appeared to be private and inquired how they had come into the complainant's possession. In another communication of 18 November, she asked all concerned to exercise restraint.

Meanwhile, on 13 November 1998 several members of the Staff Union Committee published a "Flash" entitled "E-mail and the invasion of privacy: how low will your director of department go?" That "Flash" accused a director of department of having read two "private and personal" e-mails of a staff member, and said that the Staff Union Committee "had to note yet again that not all chiefs conform to the *Standards of Conduct in the International Civil Service*", and was "sorry to be the bearer of news that encourages staff to be suspicious of their chiefs".

By a minute of 20 November, headed "A libellous flash", the complainant replied to the Director of Personnel denying the accusations contained in the "Flash" of 13 November. In her reply of 24 November, the Director of Personnel took the complainant to task for sending copies of the above-mentioned minute to numerous colleagues in the ILO, and reminded him of his duty of reserve. On 26 November the complainant wrote to the Director-General protesting at the "calumny and libel contained in the 'Flash' of 13 November 1998". He planned to publicise the document as a right of reply. By a letter of 27 November the Director of Personnel informed him that, since he had disregarded her recommendations she had no alternative but to refer the matter to the Director-General. On 11 December, she sent the complainant a minute explaining that, in view of his conduct, the Director-General deemed that he was unable to maintain a stable and productive working environment in his department. Consequently, he had decided to assign the complainant to other duties from 14 December 1998 until the Personnel Department had finished investigating the matter. In the meantime, his new official title was to be Special Adviser

on International Labour Standards. However, if he preferred, he could apply for special leave with pay.

On 27 February 1999 the complainant lodged an internal complaint with the Director-General on the grounds that the Organization had sanctioned him without applying the appropriate procedure. By a letter of 29 April, which is the impugned decision, the Director of Cabinet informed the complainant that his internal complaint was rejected. By a letter of 24 May 1999 the Chief of the Personnel Administration Branch sent him the findings of the investigation, stressing among other things that the e-mails were private.

B. The complainant alleges that removing him from his duties and reassigning him to a position having "no substance" amounted to a "hidden sanction", since no disciplinary proceedings had been conducted. Furthermore, by putting him in an office at some distance from his department, the Organization placed him in "geographical isolation", which, he says, is a form of mobbing.

He contends that the conclusions of the investigation show bias because the two e-mails were deemed to be private. This totally disregards Circular No. 41 of 14 April 1998 setting out guidelines for the use of electronic mail. There was also prejudice in the conclusion that the "Flash" of 13 November 1998 was not libellous because it did not mention him by name. The complainant alleges that if the victim is identifiable without being named in the offending publication, as is the case here, such prejudice is established. He submits that, although he was not identified in the "Flash", his name was communicated to the entire staff, "all over the world", as being the Director in question. In his view, an administration that was attentive to the dignity of its staff would not have allowed such a flash to be circulated without reacting in some way. In the past, particularly when the Staff Union published something similar in 1994, the Director-General reacted "very firmly". In this case, however, the Administration issued no publication to set the record straight. Lastly, his honour has been slighted and his health "seriously affected". Indeed, he is still suffering from serious tension and depression.

He asks the Tribunal to quash the decision of 29 April 1999. He seeks compensation for moral injury, and reimbursement of any medical costs not covered by the ILO's health insurance scheme incurred by him and his wife as a result of the publication of the "Flash" and the decision of 11 December 1998. He claims costs.

C. The Organization replies that the complaint, which is against a transitional but final decision, is receivable within the meaning of Article VII, paragraph 2, of the Statute of the Tribunal. However, the complainant's claim to repayment of his medical costs is irreceivable in that he has not exhausted the procedure for claims to compensation for illness or injury attributable to the performance of official duties. Besides, the Tribunal is not competent to rule on injury allegedly sustained by the spouse of a staff member.

On the merits, the Organization explains that the complainant's new duties consist in providing "high-level" guidance and advice on standards and social protection with a view to the preparation of a report which has "an excellent reputation". The Director-General deemed it necessary to reassign the complainant, keeping in mind that the ILO had a duty to give him responsibilities that corresponded to his qualifications, experience and grade. His new title and the office given to him undoubtedly met that requirement. It adds that the complainant never took up his new duties owing to ill health, so his objections have no basis in fact.

In its submission, whether or not the "Flash" is libellous, and whether or not the e-mails are private is immaterial. As Director of the Standards Department, the complainant had the authority to "correct the professional conduct" of the recipient of the e-mails, for example by a warning or a reprimand, and to protect the official in the Multidisciplinary Team whose participation in a seminar was in doubt. For all other matters, only the Personnel Department was competent. The ILO expects a director of department fully to respect the procedures in force. The complainant's failure to do so would have been reason enough to reassign him. Reassignment became inevitable in the light of "his persistence and the adverse consequences for the Organization" and in particular for the Standards Department.

The ILO deems it unnecessary to answer the allegations of prejudice and "mobbing" in view of the obvious lack of evidence. The reference to a circular issued in 1994 "calling the Staff Union to order" is immaterial because the circumstances of the present case are quite different. Lastly, the complainant's plea that his dignity was impaired is devoid of merit in that his reassignment was a temporary measure taken to protect his good name.

D. In his rejoinder the complainant asserts that his claim to medical costs concerns only the costs not covered by the ILO's health insurance scheme. Consequently, it does not depend on the fate of his claim to recognition of his

illness as service-incurred.

He observes that the only issue is whether or not the decision to reassign him amounts to a hidden form of disciplinary action. The decision was "not even appropriate" because transferring him would not prevent him from giving more publicity to the incident.

E. In its surrejoinder the defendant maintains that the claim to reimbursement of medical costs is irreceivable. The complainant will be entitled to full reimbursement of the costs only if his claim to recognition of his illness as service-incurred is allowed. But that claim is still pending.

Like the complainant, it considers that the case turns solely on whether his reassignment amounted to a covert disciplinary sanction. It submits that by confining his pleas to the "subjective effects" of the measure, the complainant has failed to discharge himself of the burden of proving the existence of a flaw affecting the validity or legality of the reassignment.

The purpose of the decision to assign him to other duties was first and foremost to restore a "more stable and productive" working environment in the department that he headed at the time. The intent was to prevent him not from publicising the incident but from doing so in his capacity as Director of the Standards Department. The decision was made public only because the complainant wanted to draw attention to the measure applied to him. Consequently, if his reputation was impaired he cannot hold the Organization responsible.

CONSIDERATIONS

1. The complainant, who was Director of the International Labour Standards Department of the ILO, is asking the Tribunal to quash the Director-General's decision of 29 April 1999 upholding a decision of 11 December 1998 to assign him to new duties as a Special Adviser on International Labour Standards. The measure was described as provisional and was deemed necessary in order to restore calm following a number of incidents which will be discussed below. The complainant challenged it in an internal complaint filed under Article 13.2 of the Staff Regulations on grounds of unfair treatment. He alleged that the decision amounted to a disciplinary sanction which the Organization applied without conducting disciplinary proceedings. The ILO retorted that it was a management decision which had to be taken in order to re-establish normality to a working environment that had considerably deteriorated in the Standards Department. On 29 April 1999 the Director of Cabinet rejected his internal complaint, but told the complainant that since the entire matter was being thoroughly investigated, the measure could only be a provisional one, that he would keep his grade and that everything had been done to preserve his interests and, in particular, to ensure that his new duties matched his high level of competence. Dissatisfied with this response, the complainant is challenging it before the Tribunal on the grounds that the Administration took disciplinary action against him by removing him from his duties and transferring him to a position without any substance and that, at the very least, it failed seriously in its duty of care towards him and impaired his dignity and good name.

2. The background to the case is set out under A above. The most salient facts are as follows.

In early November 1998 the complainant was given two e-mails addressed to an official in the Standards Department, one from the officials's father and the other from a colleague in Lima. The communications were written in highly indecorous terms and, although private, commented on the running of the department, the career prospects of various members of staff and a forthcoming competition for a post. The complainant sent the two e-mails to the recipient's supervisor and to the Director of Personnel, whom he asked to "take the necessary steps to prevent any recurrence of the situation". It has now been ascertained, following an inquiry conducted by the Organization, that the two e-mails were handed in to the complainant by a member of his staff who had found them in a photocopier. However, on 13 November 1998 the Staff Union issued a "Flash" entitled "E-mail and the invasion of privacy: how low will your director of department go?" The flash stated that a member of staff had been shocked to discover that "at least two of his private and personal e-mails - one of them sent to him by his father - had been read by the director of a department, who passed copies to his immediate supervisor". It also drew attention to the measures to be taken to ensure the confidentiality of messages sent over the Internet and criticised the "unacceptable behaviour of one director of department".

In a confidential minute of 18 November 1998, the Director of Personnel informed the complainant that the matter had been referred to her by the Staff Union, and asked him to explain how he had come by the e-mails. The complainant replied in a minute of 20 November, headed "A libellous flash". Although his attention had been

drawn to the need to keep the matter confidential, the complainant sent a copy of his reply to numerous colleagues. In a minute of 24 November, the Director of Personnel took him to task for his conduct pointing out that the minute of 20 November implied serious allegations against two officials, revealed identities, fell far short of the highest standard of conduct that the Organization expects of its officials and portrayed a poor image of an international civil servant who had decided to take the law into his own hands. She added that a number of officials had indicated that they did not wish to be involved in the matter and had asked the Personnel Department to take the necessary measures to restore a productive working atmosphere in the Office. She requested the complainant to stop circulating correspondence and to withdraw his request to have his previous minute, which she qualified as defamatory towards certain colleagues, published in the Staff Union's bulletin. In conclusion she informed him that an investigation had been opened to clarify all aspects of the matter.

Far from complying with her appeal for restraint, on 25 November the complainant wrote a minute to the Director-General and, although it was headed "confidential", sent copies of it to numerous members of staff. In it, he sought the suspension and dismissal of both the author and the recipient of one of the e-mails, which he quoted in full. In a further minute to the Director-General, dated 26 November, which he also communicated to other members of staff, he named nineteen officials whom he accused of participating in the production, adoption and dissemination of the flash, and asked the Director-General

"(a) to order each of the persons accused to prove, within a non-renewable period of ten calendar days at most, their accusation that [a staff member's] electronic mail [box] was violated by one of the Directors of the Office;

(b) if they were unable to produce such proof, to take steps to ensure that they publicly withdraw their accusation;

(c) if they were unable to prove their accusation and refused to withdraw it, to apply the disciplinary action provided for in Article 12.7 of the Staff Regulations."

Following the dispatch of the above minute, the Director of Personnel told the complainant on 27 November that she would inform the Director-General of the situation created by his conduct, which, in addition to breaching the confidentiality she had asked him to observe, ran counter to due process with regard to the officials implicated and obstructed the proper functioning of the Office. On 11 December 1998 the Director-General decided that, in view of the fact that the complainant was unable to maintain a stable and productive working environment in his department, he should be assigned to new functions until the Personnel Department had completed its inquiry.

By a letter of 29 April 1999, which is the impugned decision, the Director of Cabinet informed the complainant of the rejection of his internal complaint against the decision of 11 December 1998 to assign him to new duties.

3. The main issue in the present complaint is whether the complainant's reassignment should be regarded as a disciplinary sanction, in which case it must be quashed because the proper procedure for disciplinary action was clearly not applied, or whether it was a measure warranted by the needs of the service and taken by the Director-General within the discretion conferred on him by Article 1.9(a) of the Staff Regulations which allows him, in the interests of sound administration, to "assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications". The difficulty of this case stems from the fact that two types of consideration were taken into account in the decision to assign the complainant to new duties. The complainant's conduct, as recounted by the Director of Personnel among others, undoubtedly constituted the reason for his being removed from what were very important duties, specific and serious charges having been brought against him in the minutes sent to him in November 1998. But the main factor taken into account was the proper running of the service, which was seriously disrupted by the fact that a senior official - albeit, understandably, in an attempt to defend himself against unjustified attacks - had no compunction about breaking the most elementary rules of confidentiality and made public accusations against a number of colleagues and staff members, identifying them by name. The Administration decided against the immediate disciplinary procedure initially envisaged and felt that suspension for the duration of the inquiry was inappropriate. In view of the deteriorating climate, which the complainant did nothing to appease, though of course it was far from being only of his making, it was only natural that the Organization should take at least a provisional measure to ease the situation. As the Tribunal held in Judgment 1018 (*in re* Saunders No. 4), it is the duty of the head of any international organisation to take whatever measures can reduce tensions among his staff, and a transfer in the interests of the service may be an appropriate way of settling a conflictual situation. In any event, the Tribunal cannot find fault with the Director-General for having exercised his discretion in deciding that the circumstances warranted the reassignment of a director whose department was no longer functioning properly.

4. However, since it cannot be regarded as disciplinary, the measure must, as the case law prescribes, heed the staff member's dignity and good name and not cause him undue suffering. Clearly, in this case the complainant was bound to view the measure as downgrading him. However, the fact that the Organization was at pains to find him an assignment in keeping with his competence if not his wishes, to maintain his grade and to exercise the utmost discretion in dealing with the matter, shows that everything was done to protect his dignity as a senior official. The letter addressed to him on 11 December 1998 on the Director-General's behalf is significant in this respect. There is no evidence to support the complainant's assertion that a problem which arose in 1996 accounted partly for the Organization's bias, or his allegation of harassment. Similarly, the testimonies he relies on establish his professional qualities and leave no doubt as to his competence. However, they have no bearing on the lawfulness of a decision which was taken in the interests of the proper running of the Department and with a view to preserving, as best it could, both confidentiality, already seriously undermined, and at all events the complainant's dignity.

5. That being so, his claims to the quashing of the decision and, in the circumstances of the case, his claim to compensation for moral injury cannot succeed. Nor can his claim to reimbursement of the medical costs that he and his wife incurred as a result of the publication of the Staff Union Committee's flash and the Administration's decision, since it is linked to his claim to recognition of his illness as service-incurred which still awaits a decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.